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August 19, 2019

VIA ECF & ELECTRONIC MAIL

The Hon. Andrew L. Carter Jr.  
United States District Judge  
Southern District of New York  
40 Foley Square  
New York, NY 10007

Re: *Lewis v. Roosevelt Island Operating Corp. et al.*, No. 16- CV-03071 (ALC)

Dear Judge Carter:

I write in response to Defendants' August 15, 2019 letter to Your Honor regarding the Second Circuit's decision in *Lilly v. City of New York* (annexed hereto).

In *Lilly*, the Second Circuit did not award fees for Plaintiff's time spent in preparing a fee application subsequent to acceptance of a Rule 68 Offer based on a finding that the parties negotiated in good faith but were unable to agree on negotiated attorney fee amount. Defendants use cherry-picked quotes from this decision in attempting to mislead the Court in their request to deny Plaintiff's motion to reconsider. Defendants omit from their letter that the Second Circuit expressly exempted from its decision the situation herein *i.e.*, where no good faith negotiations occurred among the parties attempting to reach agreement on a fee award. The Second Circuit in *Lilly* expressly held:

Because the district court found that the parties in this case negotiated in good faith, *see Lilly*, 2017 WL 3493249, at \*8, we decline to consider whether a district court may, as a matter of equity or otherwise, award fees on fees when a party negotiates in bad faith, despite the presence of a cut-off clause in the Rule 68 offer or settlement agreement. *See, e.g., Long v. City of New York*, No. 09 Civ. 6099 (AKH), 2010 U.S. Dist. LEXIS 81020, at \*5-6 (S.D.N.Y. Aug. 6, 2010) ("The Rule 68 judgment limited recoverable fees and expenses to those incurred prior to the date of the offer. If the City's dispute over recoverable fees were in bad faith, th[e]n compensation for the work necessary for plaintiff [''] fee application may be justified.").

*Lilly*, fn. 93 at p. 25 (emphasis added). Although Defendants' letter purports to recite Plaintiff's arguments in support of his Motion to Reconsider, Defendants misleadingly omit that Plaintiff's motions unequivocally established that Defendants failed to negotiate in good faith a fee amount subsequent to acceptance of the Rule 68 Offer.<sup>1</sup> Defendants' conduct falls directly within the

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<sup>1</sup> Defendants' failure to negotiate fees post-Rule 68 acceptance was consistent with their behavior (well-established in numerous Court filings) in refusing to negotiate resolution of the underlying matter prior to service of the Rule 68 Offer. As the Court may recall, Defendants' conduct in that regard included, among other bad-faith conduct, using pretextual offers to mediate to delay Plaintiff's case. In one pretextual mediation, Defendants wasted months of Plaintiff's time negotiating mediators and interviewing mediators, and then Defendants unilaterally called off the mediation claiming they never agreed to it despite indisputable written evidence to the contrary. In another ruse, Defendants feigned participation in a mediation simply to delay Court-ordered depositions that they were unprepared to defend so they could add additional

circumstances the Second Circuit expressly “decline[d] to consider.” *Id.* Plaintiff’s motions establish with clear documentary evidence (which Defendants have neither rebutted nor contested) that Defendants refused to engage in any good faith negotiations regarding fees, refused to return Plaintiff’s counsel’s telephone calls to engage in discussions, and instead insisted that the fee amount had to be litigated. Additionally, during a Court Conference (soon after acceptance of the Rule 68 Offer) none of the numerous counsel appearing on behalf of Defendants objected or noted any disagreement when the Court stated that Plaintiff would be entitled to fees on fees subsequent to acceptance of the Rule 68 Offer.

Further, this Court has awarded “fees on fees” related to an accepted Rule 68 Offer both before and after its denial of Plaintiff’s request in the instant case. As recent as February 28, 2019, this Court awarded “fees on fees” for the second time in the same case. *Makinen v. City of New York*, 2019 WL 970945, (February 28, 2019). In *Makinen*, the Court recently held:

The language of the Rule 68 offer does not suggest that Defendants intended to pay fees on fees, but it also does not clearly foreclose Plaintiff from seeking such fees. Equity thus compels the Court to grant fees on fees as it would be unfair to deny reasonable fees incurred in seeking fees that are owed as a matter of law or contract.

*Id.* at \*2.

Accordingly, Plaintiff respectfully requests that the relief sought in Plaintiff’s Motion to Reconsider / Reargue and to Expand the Record be granted in their entirety.

Respectfully submitted,

/s/

Anthony J. Rotondi

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lawyers to their cadre of attorneys. Defendants wasted Plaintiff’s time preparing for and participating in that mediation, but Defendants and their counsel attended the mediation without any settlement authority and failed to make a single offer to Plaintiff in connection with the mediation.

17-2823 (L)

*Kayheem Lilly v. The City of New York, et al.*

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In the  
United States Court of Appeals  
For the Second Circuit

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AUGUST TERM, 2018

ARGUED: OCTOBER 30, 2018

DECIDED: AUGUST 14, 2019

Nos. 17-2823(L)-cv, 17-3000(XAP)-cv

KAYHEEM LILLY,  
*Plaintiff-Appellee-Cross-Appellant,*

*v.*

THE CITY OF NEW YORK; NYPD DETECTIVE MALCOLM FREEMAN,  
SHIELD NO. 7049; NYPD POLICE OFFICER SOUL KIM, SHIELD NO. 10804,  
*Defendants-Appellants-Cross-Appellees,*

JOHN DOE SERGEANT; JOHN DOES, RICHARD ROES; ANDREW HONG;  
DONALD CAMBRIDGE; JORGE TAJEDA; FRANK BATISTA; KEVIN  
WHETSTONE,  
*Defendants.\**

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Appeal from the United States District Court  
for the Southern District of New York.  
No. 16 Civ. 322 – Edgardo Ramos, *Judge.*

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\* Consistent with the order entered by this Court on October 18, 2013, ECF No. 118, we use the short-form caption for the purpose of publishing this opinion.

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2 Before: WALKER, LEVAL, AND DRONEY, *Circuit Judges*.

3

4 Kayheem Lilly ("Lilly") filed a § 1983 complaint against the  
5 City of New York and individual police officers for alleged  
6 deprivations of his constitutional rights. Defendants presented Lilly  
7 with an offer of judgment pursuant to Federal Rule of Civil Procedure  
8 68 for \$10,001 and reasonable attorney's fees, expenses, and costs  
9 incurred "to the date of [the] offer." Lilly accepted the offer, but the  
10 parties were unable to agree upon the sum of attorney's fees,  
11 expenses, and costs to be paid. Lilly filed a motion with the district  
12 court for an award of reasonable attorney's fees, expenses, and costs,  
13 that included the hours Lilly's solo practitioner attorney spent on  
14 clerical tasks and incurred preparing the fee application. The district  
15 court granted the application but reduced the requested hourly rate  
16 because of the simple, "relatively straightforward" nature of the case,  
17 and imposed a ten percent across-the-board reduction to the fee  
18 award to account for clerical tasks performed by the attorney. We  
19 AFFIRM the district court's decision to reduce Lilly's attorney's  
20 reasonable hourly rate in light of the simple nature of this case, as well  
21 as the district court's decision to reduce the hours claimed through an  
22 across-the-board reduction to reflect the clerical work performed. We  
23 REVERSE and VACATE, however, the district court's decision to  
24 award Lilly attorney's fees for the work incurred preparing the fee  
25 application because the express terms of the accepted Rule 68 offer of  
26 judgment limit the fees recoverable to those incurred "to the date of  
27 [the] offer."

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JEFFREY A. ROTHMAN, Law Office of Jeffrey A.  
Rothman, New York, NY, for Plaintiff-Appellee-

1 *Cross-Appellant.*

2 ELINA DRUKER, Of Counsel (Richard Dearing, *on*  
3 *the brief*), for Zachary W. Carter, Corporation  
4 Counsel, New York, NY, *for Defendants-Appellants-*  
5 *Cross-Appellees.*

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7 JOHN M. WALKER, JR., *Circuit Judge:*

8 Kayheem Lilly ("Lilly") filed a § 1983 complaint against the  
9 City of New York and individual police officers for alleged  
10 deprivations of his constitutional rights. Defendants presented Lilly  
11 with an offer of judgment pursuant to Federal Rule of Civil Procedure  
12 68 for \$10,001 and reasonable attorney's fees, expenses, and costs  
13 incurred "to the date of [the] offer." Lilly accepted the offer, but the  
14 parties were unable to agree upon the sum of attorney's fees,  
15 expenses, and costs to be paid. Lilly filed a motion with the district  
16 court for an award of reasonable attorney's fees, expenses, and costs,  
17 that included the hours Lilly's solo practitioner attorney spent on  
18 clerical tasks and incurred preparing the fee application. The district  
19 court granted the application but reduced the requested hourly rate  
20 because of the simple, "relatively straightforward" nature of the case,  
21 and imposed a ten percent across-the-board reduction to the fee  
22 award to account for clerical tasks performed by the attorney. We  
23 AFFIRM the district court's decision to reduce Lilly's attorney's  
24 reasonable hourly rate in light of the simple nature of this case, as well  
25 as the district court's decision to reduce the hours claimed through an  
26 across-the-board reduction to reflect the clerical work performed. We  
27 REVERSE and VACATE, however, the district court's decision to  
28 award Lilly attorney's fees for the work incurred preparing the fee  
29 application because the express terms of the accepted Rule 68 offer of

1 judgment limit the fees recoverable to those incurred "to the date of  
2 [the] offer."

3 **BACKGROUND**

4 Plaintiff-Appellee-Cross-Appellant Lilly filed a complaint on  
5 January 14, 2016, alleging that his civil rights were violated by the City  
6 of New York and several New York City police officers (collectively,  
7 the "City") on two occasions in October 2014. The first claim was for  
8 use of excessive force and the second was for improper issuance of  
9 three summonses for threatening behavior toward an officer,  
10 possession of an open container, and littering, all of which were later  
11 dismissed.

12 Lilly was represented by Jeffrey Rothman ("Rothman"), a civil  
13 rights attorney and solo practitioner, who filed the complaint on  
14 Lilly's behalf. On October 26, 2016, the City presented Lilly with an  
15 offer of judgment pursuant to Rule 68 of the Federal Rules of Civil  
16 Procedure, which Lilly accepted. The offer stated:

17 Pursuant to Rule 68 of the Federal Rules of Civil  
18 Procedure, defendants hereby offer to allow plaintiff  
19 [Kayheem] Lilly to take a judgment against the City of  
20 New York in this action for the total sum of Ten  
21 Thousand and One (\$10,001.00) Dollars, plus reasonable  
22 attorneys' fees, expenses, and costs to the date of this  
23 offer for plaintiff's federal claims.<sup>1</sup>

24 The City and Lilly (through Rothman) attempted to negotiate a  
25 settlement regarding attorney's fees, expenses, and costs but were  
26 unsuccessful. Rothman filed a formal motion for an award of  
27 attorney's fees, expenses, and costs with the district court, pursuant  
28 to 42 U.S.C. § 1988, for a total sum of \$34,527. That figure represents  
29 50.3 hours of work up to the date of the offer of judgment and 6.5

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<sup>1</sup> Joint App'x at 45.

1 hours of work preparing the attorney's fee application at an hourly  
2 rate of \$600, as well as 11.5 hours for work after the fee application  
3 and through the filing of Lilly's reply brief at an hourly rate of \$625.<sup>2</sup>  
4 The City objected to the fee request on the grounds that: (1) his  
5 requested hourly rate was excessive, (2) the number of hours  
6 expended was unreasonable, and (3) fees incurred after acceptance of  
7 the Rule 68 offer are not recoverable under the terms of the offer.

8 The district court granted Rothman reduced fees, expenses, and  
9 costs in the amount of \$28,128.99. The district court agreed that  
10 Rothman had comparable experience and qualifications to other civil  
11 rights attorneys who have received attorney's fee awards in the low  
12 \$600 per hour range, but believed that the "simplicity of this case  
13 warrant[ed] a reduction of his claimed hourly rates."<sup>3</sup> Due to the  
14 "relatively straightforward" nature of the case, the district court  
15 found an hourly rate of \$450 to be reasonable.<sup>4</sup> The district court also  
16 imposed a ten percent across-the-board cut to the award because  
17 some of the hours claimed were for clerical tasks that he had billed at  
18 an attorney's hourly rate. Lastly, notwithstanding the fact that the  
19 Rule 68 offer of judgment limited recoverable fees to those incurred  
20 prior to the offer, the district court granted Lilly attorney's fees for the  
21 time Rothman spent preparing the fee application. This appeal and  
22 cross-appeal followed.

## 23 DISCUSSION

24 The City appeals the district court's order granting "fees on  
25 fees" (*i.e.*, the attorney's fees Rothman incurred in litigating the  
26 application for an award of attorney's fees) because the Rule 68 offer

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<sup>2</sup> The increase reflects a \$25 increase in Rothman's hourly rate that became effective on January 1, 2016.

<sup>3</sup> Joint App'x 277-79.

<sup>4</sup> *Id.*



1 of judgment limited the recoverable attorney's fees to only those  
2 incurred prior to the offer. Lilly cross-appeals the district court's  
3 order reducing Rothman's hourly rate to \$450 and prohibiting  
4 Rothman from receiving his full hourly rate for clerical tasks.

5 We review a district court's award for attorney's fees, expenses,  
6 and costs for abuse of discretion.<sup>5</sup> "A district court abuses its  
7 discretion if it (1) bases its decision on an error of law or uses the  
8 wrong legal standard; (2) bases its decision on a clearly erroneous  
9 factual finding; or (3) reaches a conclusion that, though not  
10 necessarily the product of a legal error or a clearly erroneous factual  
11 finding, cannot be located within the range of permissible decisions."<sup>6</sup>  
12 "Given the district court's inherent institutional advantages in this  
13 area, our review of a district court's fee award is highly deferential."<sup>7</sup>  
14 This high degree of deference is appropriate because "[w]e can hardly  
15 think of a sphere of judicial decisionmaking in which appellate  
16 micromanagement has less to recommend it."<sup>8</sup> We review questions  
17 of law regarding the legal standard for granting or denying attorney's  
18 fees *de novo*.<sup>9</sup> We also review a district court's interpretation of a Rule  
19 68 offer *de novo*.<sup>10</sup>

## 20 I. Calculation of the Reasonable Hourly Rate

21 Lilly argues that the district court erred in reducing Rothman's  
22 rate from \$600 and \$625 per hour to \$450 per hour because of the  
23 "duration and simplicity" of the case. Specifically, he argues that after

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<sup>5</sup> See *Millea v. Metro-North R. Co.*, 658 F.3d 154, 166 (2d Cir. 2011).

<sup>6</sup> *Id.* (internal quotation marks omitted).

<sup>7</sup> *McDonald ex rel. Prendergast v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 450 F.3d 91, 96 (2d Cir. 2006) (per curiam).

<sup>8</sup> *Fox v. Vice*, 563 U.S. 826, 838 (2011).

<sup>9</sup> See *Scarangella v. Group Health, Inc.*, 731 F.3d 146, 151 (2d Cir. 2013).

<sup>10</sup> *Steiner v. Lewmar, Inc.*, 816 F.3d 26, 31 (2d Cir. 2016).



1 the Supreme Court's decision in *Perdue v. Kenny A. ex rel. Winn*,<sup>11</sup>  
2 district courts can no longer consider the "relatively straightforward"  
3 nature of an action in calculating the reasonable hourly rate to be  
4 awarded. To the extent our decision in *Arbor Hill Concerned Citizens*  
5 *Neighborhood Association v. County of Albany*<sup>12</sup> permits consideration of  
6 the simplicity of litigation in determining the appropriate hourly rate,  
7 Lilly contends that *Perdue* overruled *Arbor Hill*. Lilly's arguments are  
8 without merit.

9 A. Early History of Fee-Shifting Jurisprudence

10 Before addressing *Arbor Hill* and *Perdue*, we think it helpful to  
11 briefly review the relevant history of attorney's fees jurisprudence.

12 In 1976, Congress enacted the Civil Rights Attorney's Fees  
13 Award Act, 42 U.S.C. § 1988 ("Fees Act"), which authorized district  
14 courts to award the prevailing party in civil rights actions "a  
15 reasonable attorney's fee."<sup>13</sup> The Act did not specify the appropriate  
16 method for calculating a reasonable attorney's fee, but the House and  
17 Senate Reports referred to two methods that had developed in the  
18 circuit courts.<sup>14</sup>

19 The first, known as the lodestar method, was adopted by the  
20 Third Circuit in *Lindy Bros. Builders, Inc. of Philadelphia v. American*  
21 *Radiator & Standard Sanitary Corp.*<sup>15</sup> This approach calculates  
22 attorney's fees by multiplying the attorney's usual hourly rate by the  
23 number of hours billed, to produce a figure known as the lodestar.<sup>16</sup>  
24 After determining the lodestar, the district court then has discretion

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<sup>11</sup> 559 U.S. 542 (2010).

<sup>12</sup> 522 F.3d 182 (2d Cir. 2008).

<sup>13</sup> See *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

<sup>14</sup> See *Arbor Hill*, 522 F.3d at 186; see also *Hensley*, 461 U.S. at 429–30.

<sup>15</sup> 487 F.2d 161 (3d Cir. 1973).

<sup>16</sup> *Id.* at 167–68.

1 to adjust the final amount to ensure that the fee is reasonable.<sup>17</sup>

2 The second method, known as the *Johnson* approach, was  
3 developed by the Fifth Circuit in *Johnson v. Georgia Highway Express,*  
4 *Inc.*<sup>18</sup> Instead of starting with the attorney's usual hourly rate,  
5 multiplying it by the number of hours worked, *and then* determining  
6 whether that figure (the lodestar) should be adjusted, the district  
7 court determines a reasonable attorney's fee in one step by  
8 considering twelve factors.<sup>19</sup> These twelve factors are:

9 (1) the time and labor required; (2) the novelty and  
10 difficulty of the questions; (3) the level of skill required  
11 to perform the legal service properly; (4) the preclusion  
12 of employment by the attorney due to acceptance of the  
13 case; (5) the attorney's customary hourly rate; (6)  
14 whether the fee is fixed or contingent; (7) the time  
15 limitations imposed by the client or the circumstances;  
16 (8) the amount involved in the case and the results  
17 obtained; (9) the experience, reputation, and ability of the  
18 attorneys; (10) the "undesirability" of the case; (11) the  
19 nature and length of the professional relationship with  
20 the client; and (12) awards in similar cases.<sup>20</sup>

21 The Supreme Court first considered the appropriate method to  
22 calculate a reasonable attorney's fee in *Hensley v. Eckerhart*.<sup>21</sup> The  
23 Court "adopted the lodestar method in principle, without, however,  
24 fully abandoning the *Johnson* method."<sup>22</sup> Instead of using the  
25 attorney's usual hourly rate, the Court instructed district courts to

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<sup>17</sup> *Id.* at 168–69.

<sup>18</sup> 488 F.2d 714 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1989).

<sup>19</sup> *See id.* at 717–19.

<sup>20</sup> *Arbor Hill*, 522 F.3d at 186 n.3 (citing *Johnson*, 488 F.2d at 717–19).

<sup>21</sup> 461 U.S. 424 (1983).

<sup>22</sup> *Arbor Hill*, 522 F.3d at 188 (internal citation omitted).

1 determine a "reasonable hourly rate," and specifically referred to the  
2 *Johnson* factors as useful tools for determining what is reasonable.<sup>23</sup>  
3 The Court described this process of determining a reasonable hourly  
4 rate and then multiplying it by the reasonable hours billed as "an  
5 objective basis on which to make an initial estimate of the value of a  
6 lawyer's services," (*i.e.*, the lodestar).<sup>24</sup> The Court went on to hold that  
7 after calculating the lodestar in this manner, a district court has  
8 discretion to increase or decrease the final fee in "cases of exceptional  
9 success" or "only partial or limited success," respectively.<sup>25</sup>

10 A year later, in *Blum v. Stenson*, the Court reiterated its holding  
11 in *Hensley*, that the initial fee award should be determined by  
12 multiplying a reasonable hourly rate by the reasonable hours  
13 expended, and that the final award can be increased or decreased in  
14 exceptional cases to achieve a reasonable fee.<sup>26</sup> The Court explained  
15 that the Fees Act:

16 requires a "reasonable fee," and there may be  
17 circumstances in which the basic standard of reasonable  
18 rates multiplied by reasonably expended hours results in  
19 a fee that is either unreasonably low or unreasonably  
20 high. When, however, the applicant for a fee has carried  
21 his burden of showing that the claimed rate and number  
22 of hours are reasonable, the resulting product is  
23 presumed to be the reasonable fee contemplated by  
24 § 1988.<sup>27</sup>

25 This hybrid approach was again approved by the Court in the  
26 1986 case of *Pennsylvania v. Delaware Valley Citizen's Council for Clean*

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<sup>23</sup> *Id.* (citing *Hensley*, 461 U.S. at 434 n.9).

<sup>24</sup> *Hensley*, 461 U.S. at 433.

<sup>25</sup> *Id.* at 435–37.

<sup>26</sup> 465 U.S. 886, 896–97 (1984).

<sup>27</sup> *Id.* at 897.

1 *Air*.<sup>28</sup> In both *Blum* and *Delaware Valley*, however, the Court clarified  
2 that many of the *Johnson* factors “are subsumed within the initial  
3 calculation” of the lodestar (reasonable hours expended multiplied by  
4 the reasonable hourly rate), and therefore “cannot serve as  
5 independent bases for increasing [or decreasing] the basic fee award,”  
6 (i.e., the lodestar).<sup>29</sup> Specifically, the Court stated that the novelty and  
7 complexity of the issues, the special skill and experience of counsel,  
8 the quality of representation, and the results obtained from the  
9 litigation should be “fully reflected in the number of billable hours  
10 recorded by counsel” or “the reasonableness of the hourly rates.”<sup>30</sup> As  
11 a result, it is inappropriate for a district court to increase or decrease  
12 the lodestar figure on account of any of these factors, because they are  
13 already accounted for in calculating the reasonable hourly rate or  
14 reasonable hours billed to determine the lodestar.<sup>31</sup>

15 B. *Arbor Hill*

16 The Supreme Court’s adoption of a hybrid approach caused  
17 confusion amongst the lower courts as to how to balance the bright-  
18 line standards of the lodestar model with the numerous evaluations  
19 required by the *Johnson* factors and the district court’s ability to  
20 exercise its discretion to enhance or cut the final fee award in  
21 exceptional circumstances.<sup>32</sup>

22 In *Arbor Hill*, we attempted to resolve some of this tension and

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<sup>28</sup> 478 U.S. 546, 563–64 (1986).

<sup>29</sup> *Id.* at 564–65 (internal quotation marks omitted) (citing *Blum*, 465 U.S. at 898–900).

<sup>30</sup> *Blum*, 465 U.S. at 898; see also *Delaware Valley*, 478 U.S. at 564–65.

<sup>31</sup> See *Blum*, 465 U.S. at 898–99, 900; see also *Delaware Valley*, 478 U.S. at 564–65, 566–67.

<sup>32</sup> See *Arbor Hill*, 522 F.3d at 188 (“After *Hensley* and *Blum*, circuit courts struggled with the nettlesome interplay between the lodestar method and the *Johnson* method.”).

1 clarify our circuit's fee-setting jurisprudence. We instructed district  
2 courts to calculate a "presumptively reasonable fee"<sup>33</sup> by determining  
3 the appropriate billable hours expended and "setting a reasonable  
4 hourly rate, taking account of all case-specific variables."<sup>34</sup> We  
5 explained with respect to the latter:

6 [T]he district court, in exercising its considerable  
7 discretion, [should] bear in mind *all* of the case-specific  
8 variables that we and other courts have identified as  
9 relevant to the reasonableness of attorney's fees in setting  
10 a reasonable hourly rate. The reasonable hourly rate is  
11 the rate a paying client would be willing to pay. In  
12 determining what rate a paying client would be willing  
13 to pay, the district court should consider, among others,  
14 the *Johnson* factors; it should also bear in mind that a  
15 reasonable, paying client wishes to spend the minimum  
16 necessary to litigate the case effectively. The district  
17 court should also consider that such an individual might  
18 be able to negotiate with his or her attorneys, using their  
19 desire to obtain the reputational benefits that might  
20 accrue from being associated with the case. The district  
21 court should then use that reasonable hourly rate to  
22 calculate what can properly be termed the  
23 "presumptively reasonable fee."<sup>35</sup>

24 In the wake of *Arbor Hill*, we have consistently applied this  
25 method of determining a reasonable hourly rate by considering all  
26 pertinent factors, including the *Johnson* factors, and then multiplying

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<sup>33</sup> We used the term "presumptively reasonable fee" instead of the traditional term "lodestar" because the meaning of the latter term "has shifted over time, and its value as a metaphor has deteriorated to the point of unhelpfulness." *Id.* at 190. The Supreme Court, however, continues to use the term according to the definition provided by the Court in *Hensley*. For all intents and purposes, the two terms mean the same thing.

<sup>34</sup> *Id.* at 189–90.

<sup>35</sup> *Id.* at 190.

1 that rate by the number of hours reasonably expended to determine  
2 the presumptively reasonable fee.<sup>36</sup> It is only after this initial  
3 calculation of the presumptively reasonable fee is performed that a  
4 district court may, in extraordinary circumstances, adjust the  
5 presumptively reasonable fee when it “does not adequately take into  
6 account a factor that may properly be considered in determining a  
7 reasonable fee.”<sup>37</sup>

8 C. Perdue

9 After announcing the hybrid approach for calculating  
10 attorney’s fees in *Hensley*, and clarifying when it is permissible for a  
11 district court to increase or decrease the lodestar value in exceptional  
12 cases in *Blum* and *Delaware Valley*, the Supreme Court’s revisited its  
13 fee-shifting jurisprudence in 2010 in *Perdue v. Kenny A. ex rel. Winn*.

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<sup>36</sup> See, e.g., *Gortat v. Capala Bros., Inc.*, 621 F. App’x 19, 22 (2d Cir. 2015) (summary order) (“In calculating the ‘presumptively reasonable fee,’ which is generally arrived at by multiplying the number of hours reasonably expended on the litigation . . . by a reasonable hourly rate, this Court has recommended that a district court take into account what a paying client would be willing to pay.” (internal citation and quotation marks omitted)); *Torres v. Gristede’s Operating Corp.*, 519 F. App’x 1, 3–4 (2d Cir. 2013) (summary order) (“[W]e have directed consideration of the case-specific variables that we and other courts have identified as relevant to the reasonableness of attorney’s fees—including the *Johnson* factors—in setting a reasonable hourly rate.” (internal quotation marks omitted)); *Bergerson v. N.Y. State Office of Mental Health, Cent. N.Y. Psychiatric Ctr.*, 652 F.3d 277, 289 (2d Cir. 2011) (“Attorneys’ fees are awarded by determining a presumptively reasonable fee, reached by multiplying a reasonable hourly rate by the number of reasonably expended hours.”); *Millea*, 658 F.3d at 166 (“Both this Court and the Supreme Court have held that the lodestar—the product of a reasonable hourly rate and the reasonable number of hours required by the case—creates a ‘presumptively reasonable fee.’”); *Konits v. Valley Stream Cent. High Sch. Dist.*, 350 F. App’x 501, 503 (2d Cir. 2009) (summary order) (“In determining reasonable attorneys’ fees, a district court must: (1) set a reasonable hourly rate, bearing in mind all of the case specific variables, and (2) use the reasonable hourly rate to calculate a ‘presumptively reasonable fee.’”).

<sup>37</sup> *Millea*, 658 F.3d at 167 (quoting *Perdue*, 559 U.S. at 554).

1 In *Perdue*, the Court was “asked to decide whether either the  
2 quality of an attorney’s performance or the results obtained are  
3 factors that may properly provide a basis for an enhancement” of the  
4 lodestar value.<sup>38</sup> The Court first affirmed its long-standing position  
5 that “the lodestar method yields a fee that is presumptively  
6 sufficient,” but “that presumption may be overcome in those rare  
7 circumstances in which the lodestar does not adequately take into  
8 account a factor that may properly be considered in determining a  
9 reasonable fee.”<sup>39</sup> Factors that are already subsumed in the lodestar  
10 calculation cannot be used to enhance or cut the lodestar amount.<sup>40</sup>  
11 The Court reiterated that “the novelty and complexity of a case  
12 generally may not be used as a ground for enhancement because these  
13 factors ‘presumably are fully reflected in the number of billable hours  
14 recorded by counsel,’” as well as the reasonable hourly rate.<sup>41</sup> Thus,  
15 *Perdue* confirmed the long-standing approach to calculating  
16 attorney’s fees endorsed by the Supreme Court in *Hensley*, *Blum*,  
17 *Delaware Valley*, as well as our circuit in *Arbor Hill*.

18 D. The District Court’s Reasonable Hourly Rate  
19 Determination

20 In his fee application, Lilly requested an hourly rate first at \$600  
21 and later at \$625 per hour for Rothman’s work on the matter. The  
22 City argued that this rate was unreasonable because the case was a  
23 simple, “garden variety” civil rights case.<sup>42</sup> The district court agreed  
24 with the City that the case was “relative[ly] simpl[e]”<sup>43</sup> and, relying

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<sup>38</sup> 559 U.S. at 554.

<sup>39</sup> *Id.* at 552, 553–54.

<sup>40</sup> *Id.* at 553 (citing *Delaware Valley*, 478 U.S. at 566).

<sup>41</sup> *Id.* (quoting *Blum*, 465 U.S. at 898 (brackets omitted)).

<sup>42</sup> *Lilly v. City of New York*, No. 16 Civ. 322 (ER), 2017 WL 3493249, at \*2 (S.D.N.Y. Aug. 15, 2017).

<sup>43</sup> *Id.* at \*3–5.



1 on *Arbor Hill*, that the hourly rate should reflect this lack of  
2 complexity.<sup>44</sup> Thus, the district court looked to the reasonable hourly  
3 rates for civil rights attorneys working on a simple, garden variety  
4 civil rights case in the Southern District of New York.<sup>45</sup> The district  
5 court found that similar, straightforward civil rights cases in the  
6 Southern District involving attorneys with similar experience and  
7 qualifications as Rothman resulted in hourly rates between \$350 and  
8 \$450.<sup>46</sup> Therefore, the district court awarded Rothman an hourly rate  
9 of \$450, at the top of the range.

10 We find no error in the district court's reasoning. As we  
11 emphasized in *Arbor Hill*, "[t]he reasonable hourly rate is the rate a  
12 paying client would be willing to pay . . . bear[ing] in mind that a  
13 reasonable, paying client wishes to spend the minimum necessary to  
14 litigate the case effectively."<sup>47</sup> It was entirely appropriate for the  
15 district court to consider the complexity of a matter because a  
16 reasonable paying client would consider the complexity of his or her  
17 case when deciding whether an attorney's proposed hourly rate is  
18 fair, reasonable, and commensurate with the proposed action. The  
19 district court's decision to consider both Rothman's experience and  
20 the garden-variety nature of the litigation, which "lasted less than 10  
21 months, required no depositions, and involved no substantial  
22 motions or briefings" or appearances before the district court,<sup>48</sup> was  
23 consistent with our direction for district courts, "in exercising [their]  
24 considerable discretion, to bear in mind *all* of the case-specific  
25 variables that we and other courts have identified as relevant to the

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<sup>44</sup> *Id.* at \*4.

<sup>45</sup> *Id.* at \*4–5.

<sup>46</sup> *Id.* at \*5.

<sup>47</sup> *Arbor Hill*, 522 F.3d at 190.

<sup>48</sup> *Lilly*, 2017 WL 3493249, at \*5.

1 reasonableness of attorney's fees in setting a reasonable hourly  
2 rate."<sup>49</sup>

3       Lilly's argument that the district court's consideration of the  
4 simple nature of this case and our opinion in *Arbor Hill* permitting  
5 such consideration are in conflict with *Perdue* is misplaced. *Perdue*  
6 addressed whether a district court, *after* calculating a reasonable  
7 hourly rate and multiplying it by the reasonable number of hours  
8 worked to produce the lodestar, could grant a fee enhancement or cut  
9 to the lodestar amount in recognition of the quality of an attorney's  
10 performance or the results obtained.<sup>50</sup> *Perdue* did not involve a  
11 challenge to the district court's computation of the reasonable hourly  
12 rate at all—it only concerned the propriety of the fee enhancement. It  
13 was in this context that the Court reiterated its prior statements from  
14 *Blum* and *Delaware Valley*, that the novelty and complexity of a case  
15 generally may not be used as a ground for an enhancement or  
16 reduction because those factors are already reflected in the reasonable  
17 hourly rate and reasonable hours billed (*i.e.*, the lodestar).<sup>51</sup>

18       *Perdue*, therefore, did not overrule *Arbor Hill* or otherwise  
19 prohibit district courts from considering the novelty or complexity of  
20 a case in determining the reasonable hourly rate or hours billed.  
21 *Perdue* is consistent with prior Supreme Court opinions that indicate  
22 that case-specific factors like the novelty or complexity of the matter  
23 are appropriately considered in determining the reasonable hourly  
24 rate or hours billed. Importantly, the *Perdue* Court stated that "the

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<sup>49</sup> *Arbor Hill*, 522 F.3d at 190.

<sup>50</sup> *Perdue*, 559 U.S. at 548 (describing how the district court determined a reasonable hourly rate and reasonable hours billed, multiplied them to calculate a lodestar of approximately \$6 million, and "then enhanced this award by 75%, concluding that the lodestar calculation did not take into account" various factors warranting an increase).

<sup>51</sup> *Id.* at 553.

1 lodestar method produces an award that roughly approximates the  
2 fee that the prevailing attorney would have received if he or she had  
3 been representing a paying client who was billed by the hour in a  
4 *comparable case*.”<sup>52</sup> And as in *Delaware Valley* and *Blum*, the *Perdue*  
5 Court specifically stated that the novelty and complexity of a case are  
6 presumably reflected in the lodestar amount.<sup>53</sup>

7 Finally, Lilly points to a quote from the *Perdue* opinion, in  
8 which the Court criticizes the old *Johnson* method created by the Fifth  
9 Circuit because it “gave very little actual guidance to district courts”  
10 and “placed unlimited discretion in trial judges and produced  
11 disparate results.”<sup>54</sup> This, Lilly says, is evidence that the *Johnson*  
12 factors, including the novelty and complexity of the case, cannot be  
13 used by district courts to determine a reasonable fee. But Lilly  
14 confuses the Court’s criticism of the “*Johnson* approach”<sup>55</sup> with the  
15 permissive use of the *Johnson* factors in determining the reasonable  
16 hourly rate and reasonable hours billed to determine the  
17 presumptively reasonable fee or lodestar.<sup>56</sup> *Hensley* and its progeny  
18 make clear that while a strict application of the *Johnson* method of  
19 calculating attorney’s fees used by the Fifth Circuit is too imprecise  
20 and variable to be reliable, the twelve *Johnson* factors remain  
21 important tools for helping district courts calculate the lodestar and,  
22 in exceptional cases, determining whether an enhancement or cut to

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<sup>52</sup> *Id.* at 551 (emphasis omitted) (emphasis added).

<sup>53</sup> *Id.* at 553; *Delaware Valley*, 478 U.S. at 565; *Blum*, 465 U.S. at 898.

<sup>54</sup> *Perdue*, 559 U.S. at 550–51 (internal quotation marks omitted).

<sup>55</sup> *Id.* at 551–52.

<sup>56</sup> See *Jin v. Pacific Buffet House, Inc.*, No. 06-CV-579 (VVP), 2010 WL 2653334, at \*2 n.2 (E.D.N.Y. June 25, 2010) (*Perdue* “cautions against using a strict *Johnson* approach as the primary basis for determining reasonable attorneys’ fees, but nowhere calls into question the idea of using relevant *Johnson* factors in helping to come to a reasonable fee”).

1 the lodestar is warranted.<sup>57</sup>

2 Finding that the district court correctly applied the law,  
3 reached a conclusion within the range of permissible decisions, and  
4 did not abuse its discretion on a clearly erroneous factual finding, we  
5 have no basis to vacate the district court's decision to award Rothman  
6 an hourly rate of \$450. We therefore affirm this portion of the district  
7 court's order.

## 8 II. Reduction of the Fee for Clerical Tasks

9 Lilly also asserts that the district court erred by prohibiting  
10 Rothman from receiving his full hourly rate of \$450 for clerical tasks,  
11 such as sending faxes, printing documents, etc. Lilly argues that a  
12 district court should not "reduce the hourly billing rate of a solo  
13 practitioner attorney who does not operate with the assistance of  
14 associates, paralegals, or other support staff concerning time he or she  
15 reasonably spends on clerical tasks in advancing the litigation."<sup>58</sup>

16 We have not addressed whether a district court may discount  
17 the reasonable hours expended or the reasonable hourly rate an  
18 attorney spends on tasks that are clerical or administrative in nature.  
19 But the Supreme Court provided guidance on this question in  
20 *Missouri v. Jenkins by Agyei*.<sup>59</sup> In that case, the Court held that plaintiffs  
21 could recover attorney's fees under the Fees Act for work performed  
22 by paralegals and law clerks under the supervision of an attorney at

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<sup>57</sup> See *Hensley*, 461 U.S. at 434 n.9 ("The district court also may consider [the] factors identified in *Johnson* . . . , though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate."); *Delaware Valley*, 478 U.S. at 563–64 ("[In *Hensley*, we] adopted a hybrid approach that shared elements of both *Johnson* and the lodestar method of calculation.").

<sup>58</sup> Appellee-Cross-Appellant's Br. at 7.

<sup>59</sup> 491 U.S. 274 (1989).

1 the market rate for their services, rather than at cost to the attorney.<sup>60</sup>  
2 However, the Court cautioned that “purely clerical or secretarial tasks  
3 should not be billed at a paralegal rate” by either a paralegal or an  
4 attorney performing such tasks.<sup>61</sup> The Court explained:

5 It is appropriate to distinguish between legal work, in the  
6 strict sense, and investigation, clerical work, compilation  
7 of facts and statistics and other work which can often be  
8 accomplished by non-lawyers but which a lawyer [or  
9 paralegal] may do because he has no other help available.  
10 Such non-legal work may command a lesser rate. Its  
11 dollar value is not enhanced just because a lawyer [or  
12 paralegal] does it.<sup>62</sup>

13 We therefore conclude that the district court did not commit  
14 legal error in reducing Lilly’s fee award to account for clerical tasks  
15 performed by Rothman. As we have stated, the key inquiry in  
16 determining the reasonableness of an attorney’s hourly rate and  
17 hours billed is whether a paying client would be willing to pay the  
18 fee.<sup>63</sup> The answer to this question, of course, will vary depending on  
19 the circumstances of the case, the attorney, and the customs in the  
20 relevant legal market. Therefore, while district courts have the legal  
21 authority and discretion to either reduce an attorney’s hourly rate for  
22 time spent on clerical tasks or apply an across-the-board reduction to  
23 the hours billed or total fee award to account for time spent on clerical  
24 tasks (or block-billed time entries reflecting a mix of clerical and legal  
25 work), a district court is not required to make such reductions. As

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<sup>60</sup> *Id.* 286–87.

<sup>61</sup> *Id.* at 288 n.10.

<sup>62</sup> *Id.* (internal quotation marks omitted).

<sup>63</sup> *Arbor Hill*, 522 F.3d at 190; *see also Perdue*, 559 U.S. at 551 (“[T]he lodestar method produces an award that *roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case. . . .” (emphasis in original)).

1 with all aspects of our fee-shifting jurisprudence, we afford district  
2 courts broad discretion in awarding attorneys' fees because they are  
3 much closer to the details of each individual case and can better  
4 determine what is reasonable and appropriate in the fee calculus for  
5 the particular case.<sup>64</sup>

6 Here, the district court reviewed the time sheets submitted by  
7 Rothman and found a variety of obviously clerical tasks, as well as  
8 entries that "blend clerical tasks with legal tasks."<sup>65</sup> A review of the  
9 time sheets confirms that many entries describe clerical tasks that are  
10 not appropriately billed at Rothman's reasonable hourly rate of \$450,  
11 such as sending and receiving faxes, requesting and receiving medical  
12 records, serving papers, and hand-delivering courtesy copies of  
13 filings to the courthouse.<sup>66</sup> The fact that Rothman is a solo practitioner  
14 does not entitle him to his full hourly rate as an attorney for purely  
15 clerical work. Indeed, it is highly unlikely that a paying client would  
16 agree to pay any person \$450 for an hour of sending and receiving  
17 faxes, calling medical offices, and delivering papers. We find the  
18 district court's imposition of a ten percent reduction to the fee award  
19 on account of clerical work appropriate, and certainly not an abuse of  
20 discretion, because the time entries reflecting 50.3 hours of work show  
21 at least 5 hours of purely clerical work.<sup>67</sup> In reducing Rothman's  
22 hours by ten percent to account for clerical tasks, we are confident  
23 that the district court achieved "rough justice," if not "auditing  
24 perfection," in its calculation of the appropriate fee award.<sup>68</sup> We

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<sup>64</sup> See *Fox*, 563 U.S. at 838.

<sup>65</sup> *Lilly*, 2017 WL 3493249, at \*6.

<sup>66</sup> See Joint App'x at 78, 89–92, 247.

<sup>67</sup> See *McDonald*, 450 F.3d at 96 ("A district court may exercise its discretion and use a percentage deduction as a practical means of trimming fat from a fee application." (internal quotation marks omitted)).

<sup>68</sup> See *Fox*, 563 U.S. at 838.

1 therefore uphold this portion of the district court's order.

2 **III. Award of Fees on Fees**

3 Finally, the City challenges the district court's decision to grant  
4 attorney's fees for time Rothman spent working on the fee application  
5 and reply brief in support of that application. The City asserts that  
6 the district court did not have the authority to award those fees  
7 because they were incurred after the City made, and Lilly accepted,  
8 the Rule 68 offer of judgment, which explicitly contemplated the  
9 payment of attorney's fees only "up until the date of the offer."<sup>69</sup>

10 Ordinarily, a district court has authority and discretion to  
11 award attorney's fees for hours expended on a fee application made  
12 under the Fees Act, so-called fees on fees.<sup>70</sup> The question here is  
13 whether the parties' agreement to settle the case and cut off attorney's  
14 fees as of the time of the offer circumscribes the district court's  
15 authority to award fees accrued after the offer date. We believe it  
16 does.

17 Federal Rule of Civil Procedure 68 permits a party defending a  
18 claim to serve an opposing party with "an offer to allow judgment on  
19 specified terms."<sup>71</sup> If the opposing party accepts the offer, then either  
20 party may file the offer and notice of acceptance with the court, and  
21 the "clerk must then enter [the] judgment" specified in the  
22 agreement.<sup>72</sup> If the opposing party rejects the offer and that party  
23 eventually obtains a judgment that is not as favorable as the

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<sup>69</sup> See Joint App'x at 45.

<sup>70</sup> See *Gagne v. Maher*, 594 F.2d 336, 343–44 (2d Cir. 1979), *aff'd*, 448 U.S. 122 (1980);  
see also *Hines v. City of Albany*, 862 F.3d 215, 223 (2d Cir. 2017) ("Prevailing parties  
under Section 1988 are therefore entitled to recover a reasonable fee for preparing  
and defending a fee application.").

<sup>71</sup> Fed. R. Civ. P. 68(a).

<sup>72</sup> *Id.*



1 unaccepted offer, the opposing party must pay the costs incurred by  
2 the defendant after the offer was made,<sup>73</sup> which includes attorney's  
3 fees.<sup>74</sup> The purpose of this mechanism is to "encourage settlement  
4 and avoid litigation" by "prompt[ing] both parties to a suit to  
5 evaluate the risks and costs of litigation, and to balance them against  
6 the likelihood of success upon trial on the merits."<sup>75</sup>

7 Like a typical settlement agreement, an accepted Rule 68 offer  
8 of judgment is a contract, and it must be interpreted according to  
9 ordinary contract principles.<sup>76</sup> Critically, "[i]f the terms of a contract  
10 are clear, courts must take care not to alter or go beyond the express  
11 terms of the agreement, or to impose obligations on the parties that  
12 are not mandated by the unambiguous terms of the agreement  
13 itself."<sup>77</sup>

14 The accepted Rule 68 offer at issue here (*i.e.*, the contract)  
15 unambiguously states that the recoverable attorney's fees, expenses,  
16 and costs are limited to those incurred by the date of the offer, which  
17 was October 26, 2016.<sup>78</sup> The fees Rothman charged for work on the  
18 fee application and reply brief in support of that application were  
19 incurred between November 30, 2016, and January 20, 2017, after the  
20 cut-off date for fees in the agreement.<sup>79</sup> Therefore, they cannot be  
21 recovered by Lilly, and the district court had no authority to award  
22 them.

23 Nonetheless, the district court determined that because the

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<sup>73</sup> Fed. R. Civ. P. 68(d).

<sup>74</sup> *Marek v. Chesny*, 473 U.S. 1, 9 (1985).

<sup>75</sup> *Id.* at 5.

<sup>76</sup> *Steiner*, 816 F.3d at 31.

<sup>77</sup> *Id.* at 32 (internal quotation marks omitted).

<sup>78</sup> See Joint App'x at 45–47.

<sup>79</sup> See *id.* at 247.

1 parties acted in good faith in negotiating the attorney's fees to be paid  
2 to Lilly, but were simply unable to agree on a reasonable amount,  
3 equity counseled in favor of granting Lilly attorney's fees for the time  
4 spent working on the fee application and reply brief.<sup>80</sup> The district  
5 court is not alone in granting these fees on fees as a matter of equity  
6 despite the clear terms of the parties' agreements barring such  
7 awards.<sup>81</sup> As noble as this practice may be, it violates the first  
8 principle of contract interpretation: "where the language of the  
9 contract is clear and unambiguous, the contract is to be given effect  
10 according to its terms."<sup>82</sup> By awarding Lilly fees beyond what the  
11 parties agreed to, the district court effectively rewrote the contract.  
12 This it cannot do.

13 Lilly makes three arguments for why the district court did not  
14 err, none of which is persuasive. First, he asserts that the offer of  
15 judgment's inclusion of reasonable attorney's fees up to the date of  
16 the offer "necessarily includes fees for the time that an attorney must  
17 spend to move to obtain those underlying fees if Defendants will not  
18 enter into a reasonable settlement concerning the underlying fees."<sup>83</sup>  
19 This interpretation of the contract is not supported by its clear terms,

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<sup>80</sup> *Lilly*, 2017 WL 3493249, at \*8.

<sup>81</sup> See, e.g., *Rosado v. City of New York*, No. 11 Civ. 4285 (SAS), 2012 WL 955510, at \*6 (S.D.N.Y. Mar. 15, 2012) ("Plaintiff also seeks fees incurred by counsel in preparing the instant fee application. However, both the Rule 68 Offer of Judgment and plaintiff's Notice of Acceptance specifically limited reasonable attorney's fees, expenses and costs to the date of this offer. . . . Nonetheless, as a matter of equity, plaintiff should be awarded some amount for the time his counsel spent in preparing the instant fee application." (internal quotation marks omitted)). But see *Schoolcraft v. City of New York*, No. 10 Civ. 6005 (RWS), 2016 WL 4626568, at \*13 (S.D.N.Y. Sept. 6, 2016) ("The Rule 68 Judgment provides 'plaintiff shall be entitled to reasonable attorney's fees, expenses, and costs to the date of this offer.' On the terms of the agreement alone, fees-on-fees are denied." (internal citation omitted)).

<sup>82</sup> *Steiner*, 816 F.3d at 31 (modifications omitted) (internal quotation marks omitted).

<sup>83</sup> Appellee-Cross-Appellant's Br. at 28.

1 nor is it a necessary assumption. There is nothing in the agreement's  
2 terms to indicate that, in the event a fee application to the court is  
3 needed to determine what constitutes "reasonable attorney's fees,"  
4 the parties intended for any attorney's fees incurred by Lilly in that  
5 process to be included in the amount the City agreed to pay as  
6 reasonable attorney's fees. To the contrary, the express terms of the  
7 contract state that the City will only be liable for reasonable attorney's  
8 fees incurred on or before the date of the offer, and not subsequent  
9 thereto. The district court acknowledged that the offer of judgment  
10 contains "language expressly limiting recoverable fees and expenses  
11 to those incurred prior to the Rule 68 Offer" before it then granted  
12 fees on fees as a matter of equity.<sup>84</sup>

13 Second, Lilly invokes the doctrine of *contra proferentem* to assert  
14 that the ambiguous language in the agreement "must be construed  
15 against Defendants since they drafted it unilaterally in the context of  
16 making a Rule 68 offer."<sup>85</sup> Lilly's statement of the rule is correct: that  
17 ambiguities in the language of a Rule 68 offer of judgment are to be  
18 "construed against the party making the offer."<sup>86</sup> But, as discussed,  
19 the offer is not ambiguous. Lilly cannot read ambiguity into the clear  
20 terms of the contract in order to invoke the doctrine of *contra*  
21 *proferentem*.

22 Finally, Lilly urges that even if the offer of judgment's terms do  
23 in fact preclude fees on fees, then they should be held "void as a  
24 matter of public policy."<sup>87</sup> We are sympathetic to the fact that because  
25 the parties were unable to agree on reasonable attorney's fees,  
26 Rothman was forced to prepare, file, and argue a fee application to

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<sup>84</sup> *Lilly*, 2017 WL 3493249, at \*7.

<sup>85</sup> Appellee-Cross-Appellant's Br. at 31-32.

<sup>86</sup> *Steiner*, 816 F.3d at 31.

<sup>87</sup> Appellee-Cross-Appellant's Br. at 36.

1 seek his fee, and that due to the terms of the parties' agreement, he is  
2 not able to be compensated for that extra work. Nonetheless, the  
3 argument that an offer of judgment or settlement agreement that cuts  
4 off fees on fees is void as a matter of public policy is contradicted by  
5 controlling Supreme Court precedent.

6 In *Evans v. Jeff D.*, the Court held that because the Fees Act  
7 bestowed the right to an award of attorney's fees in civil rights actions  
8 to the prevailing *party*, and not the attorney, parties were free to waive  
9 their right to attorney's fees as part of a settlement agreement on the  
10 merits.<sup>88</sup> Specifically the Court stated that Congress neither  
11 "bestowed fee awards upon attorneys nor rendered them  
12 nonwaivable or nonnegotiable; instead, it added them to the arsenal  
13 of remedies available to combat violations of civil rights, a goal not  
14 invariably inconsistent with conditioning settlement on the merits on  
15 a waiver of statutory attorney's fees."<sup>89</sup> The Court reasoned that it  
16 would be poor policy to prohibit litigants from waiving their  
17 statutory right to attorney's fees as part of a compromise on the merits  
18 because it would "impede vindication of civil rights, at least in some  
19 cases, by reducing the attractiveness of settlement."<sup>90</sup> Indeed, because  
20 the attorney's fee award is often similar to or greater than the amount  
21 of damages received on the merits,<sup>91</sup> it is "not implausible to  
22 anticipate that parties to a significant number of civil rights cases will  
23 refuse to settle if liability for attorney's fees remains open, thereby  
24 forcing more cases to trial, unnecessarily burdening the judicial

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<sup>88</sup> 475 U.S. 717, 730–32 (1986); see also *Venegas v. Mitchell*, 495 U.S. 82, 87–88 (1990) (holding that it is the party's right to waive, settle, or negotiate the party's entitlement to receive attorney's fees).

<sup>89</sup> *Evans*, 475 U.S. at 731–32.

<sup>90</sup> *Id.* at 732.

<sup>91</sup> *Id.* at 734–35 & n.24 (collecting examples of attorney's fee awards greater than the merits award). In fact, this case is one such example.

1 system, and disserving civil rights litigants.”<sup>92</sup> These  
2 pronouncements from the Supreme Court illustrate that, contrary to  
3 Lilly’s arguments, it is not against public policy for litigants to waive  
4 their statutory right to attorney’s fees—let alone fees on fees.

5 Thus, we conclude that when a settlement cuts off a plaintiff’s  
6 entitlement to attorney’s fees on a specific date, a district court may  
7 not award a party attorney’s fees for work incurred after that cut-off  
8 date. This includes fees for work performed preparing a fee  
9 application submitted to the district court in the event the parties are  
10 unable to agree on the attorney’s fees to be awarded despite a good  
11 faith effort to negotiate.<sup>93</sup> If a plaintiff desires fees on fees in the event  
12 a fee application to the district court is required, the plaintiff should  
13 ensure that the settlement terms do not foreclose the availability of  
14 such fees. Accordingly, the portion of the district court’s decision and  
15 order granting Lilly attorney’s fees for all work performed after  
16 October 26, 2016, cannot stand.

## 17 CONCLUSION

18 We have considered the parties’ other arguments and find them  
19 to be without merit. We therefore AFFIRM, in part, the district court’s  
20 order setting Rothman’s hourly rate at \$450 per hour and reducing  
21 Lilly’s fee award by ten percent to account for clerical tasks billed by

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<sup>92</sup> *Id.* at 736–37.

<sup>93</sup> Because the district court found that the parties in this case negotiated in good faith, *see Lilly*, 2017 WL 3493249, at \*8, we decline to consider whether a district court may, as a matter of equity or otherwise, award fees on fees when a party negotiates in bad faith, despite the presence of a cut-off clause in the Rule 68 offer or settlement agreement. *See, e.g., Long v. City of New York*, No. 09 Civ. 6099 (AKH), 2010 U.S. Dist. LEXIS 81020, at \*5–6 (S.D.N.Y. Aug. 6, 2010) (“The Rule 68 judgment limited recoverable fees and expenses to those incurred prior to the date of the offer. If the City’s dispute over recoverable fees were in bad faith, th[e]n compensation for the work necessary for plaintiff[’]s fee application may be justified.”).

26

- 1 Rothman, and REVERSE and VACATE, in part, the district court's
- 2 decision and order awarding Lilly \$7,290.00 for Rothman's work on
- 3 the fee application and reply brief in support of that application.